FILED
APR 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-958

# In the Supreme Court of the United States

MELVIN E. HUNTER, ET AL.,

*PETITIONERS,*

v.

JAMES ALLEN HYDRICK, ET AL.,

*RESPONDENTS.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether the complaint in this case alleges sufficient factual detail to survive a motion to dismiss, under ordinary Federal Rule of Civil Procedure 8(a) notice pleading standards.

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## INTRODUCTION

California's Sexually Violent Predator ("SVP") Act creates a system of ongoing civil commitment for certain persons who have completed their prison sentences and would otherwise be released. Respondents were each civilly committed as SVPs at Atascadero State Hospital following completion of their prison terms. The complaint in this case alleges that petitioners, who are administrators at Atascadero, intentionally implemented policies that in many cases resulted in conditions far worse than those that are constitutionally mandated for *prisons*, and that are unrelated to the SVP Act's express goals of effective treatment. The complaint seeks declaratory and injunctive relief, and damages from petitioners in their individual capacities.

Although discovery was nearly complete, petitioners chose to file a motion to dismiss, based solely on the pleadings, on the ground of qualified immunity. In that posture, in which the complaint's allegations must be accepted as true, the Ninth Circuit held only that the complaint states a claim, and affirmed the district court's order denying qualified immunity as to several of the claims. The Ninth Circuit expressed no view on the merits, or on whether petitioners would have a basis to renew their claim of qualified immunity at summary judgment based on a fuller record.

Petitioners now ask this Court to review the pleading standards for civil rights actions against individual defendants, and claim a phantom circuit split. But any historical conflicts have already been resolved by this Court. As early as 1980, this Court held that it "has never indicated that qualified

immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question. . . . Since qualified immunity is a defense, the burden of pleading it rests with the defendant." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Since then, this Court has issued a steady stream of opinions clarifying that Federal Rule of Civil Procedure 8 applies to civil rights cases just as to other cases, and that lower courts should not apply any different pleading standards absent a rule or statute so providing. Every circuit has now recognized that the standard for pleading a claim under 42 U.S.C. § 1983 is no different than for pleading other civil causes of action. This Court's most recent explication of that standard, in *Bell Atlantic Corp. v. Twombly*, explained that a plaintiff need only plead sufficient facts that, if true, could provide "plausible grounds to infer" that a violation of law occurred, or "enough fact to raise a reasonable expectation that discovery will reveal evidence . . . even if it strikes a savvy judge that actual proof of those facts is implausible, and 'that a recovery is very remote and unlikely.'" 127 S. Ct. 1955, 1965 (2007) (citation omitted).

The Ninth Circuit's holding in this case is entirely consistent with those principles. Respondents have alleged that formal policies at Atascadero, physical attributes of the facility, and widespread common practices by facility staff all clearly violate their constitutional rights. It is considerably more than "plausible" to infer that petitioners, who are senior administrators at the hospital, participated in formulating these policies and were aware of the basic conditions under which their own program was run. And the "conflict" petitioners point to reflects only the

unsurprising reality that the *application* of well-settled pleading standards to widely varying *facts* necessarily results in a range of outcomes. Ultimately, petitioners are complaining only about the Ninth Circuit's fact-bound evaluation of this particular complaint, which obviously is not appropriate for this Court's review. Petitioners' assertion that other circuits would have applied the law to these facts differently is both speculative and incorrect.

In the end, petitioners simply disagree that the facts are actually as alleged, and they disagree with the Ninth Circuit's reading of the complaint. But having expressly chosen *not* to file a motion for summary judgment, and instead to try to dismiss this case on the pleadings, petitioners may not now try to reframe their disagreement with the allegations as a dispute over the law. The petition for certiorari should be denied.

## STATEMENT OF THE CASE

### California's Sexually Violent Predator Act

California's SVP Act, California Welfare & Institutions Code §§ 6600 *et seq.*, permits California to place individuals convicted of a certain class of sexual offenses—and who have fully served their prison sentences—in civil commitments following the expiration of their sentence. Once committed, these "sexually violent predators," or "SVPs," can only be released after a court finds that they no longer qualify as sexually violent predators.[1] *See* Cal. Welf. & Inst. Code § 6605.

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[1] The SVP Act defines a "sexually violent predator" as a "person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety

The SVP Act transfers responsibility for SVPs from the criminal to the civil commitment arena. If an incarcerated individual is suspected of being an SVP, both the Department of Corrections and the Department of Mental Health evaluate the inmate at least six months prior to his scheduled release. Cal. Welf. & Inst. Code § 6601(a)–(b). If both agree that the individual may qualify as an SVP, the county's designated counsel then files a petition for civil commitment in state court. *Id.* § 6601(h)–(i). Once the court approves the petition, the SVP is "committed for an indeterminate term to the custody of the State Department of Mental Health." *Id.* § 6604.

The statute permits civil commitment of SVPs for the express purposes of "appropriate treatment" by the Department of Mental Health. *See* Cal. Welf. & Inst. Code § 6604. The SVP Act mandates that the Department of Mental Health provide "programming" that "shall afford the person with treatment" and must "take into consideration the unique characteristics, individual needs, and choices of persons committed under this article, including whether or not a person needs antipsychotic medication, whether or not a person has physical medical conditions, and whether or not a person chooses to participate in a specified course of offender treatment." *Id.* § 6605(a), (d).

Atascadero State Hospital, where respondents were initially civilly committed, established a five phase treatment program for SVPs. The five phases of the program correspond to a "Patient Access System," which provides "Access Levels" to Atascadero; a

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of others in that it is likely that he or she will engage in sexually violent criminal behavior." Cal. Welf. & Inst. Code § 6600(a)(1).

higher Access Level means less supervision and access to more services at Atascadero, such as the law library. Pet. App. 84a–87a. Phase One of the treatment consists of group sessions wherein each SVP must sign a "contract" or statement prepared by Atascadero staff acknowledging that he has a "problem" or "illness" and needs "help" or "treatment." Pet. App. 86a. An SVP cannot advance from Phase One to Phase Two of the program without signing this statement. Pet. App. 86a, 88a–89a. Phases Two through Five involve "cognitive" treatments designed to train SVPs to associate inappropriate or violent sexual activities with unpleasant sensations. Pet. App. 86a.

An SVP is entitled to an annual reexamination to determine whether he should remain in civil commitment. Cal. Welf. & Inst. Code § 6605(a). If it is determined that the SVP continues to be a danger to the health or safety of the community, the civil commitment continues for two more years. *Id.* § 6605(e). Such extensions of civil commitment can continue indefinitely, or, if the SVP completes Phase Five of the program, he may be released under a Conditional Release Program. Pet. App. 86a–87a. According to the complaint, no SVP had ever been permitted into the Conditional Release Program.[2] *Id.*

**The Complaint Against Petitioners**

Respondents represent a certified class of approximately 600 civilly-committed SVPs who were confined at Atascadero pursuant to the SVP Act. Pet. App. 3a. Respondents' Second Amended Complaint,

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[2] The Ninth Circuit noted that in the years since respondents filed their complaint, just three (out of over seven hundred) SVPs have been released under the SVP Act. Pet. App. 6a n.3.

which is at issue here, includes as defendants the four petitioners: Melvin E. Hunter, Executive Director of Atascadero; Jon DeMorales, former Executive Director of Atascadero; Craig Nelson, Clinical Administrator of Atascadero; and Grenda Ernst, Director of Program VII at Atascadero.

The complaint alleges that petitioners violated respondents' constitutional rights in two ways: (1) petitioners established policies that define and implement Atascadero's treatment program under the SVP Act, and that violate respondents' constitutional rights; and (2) petitioners permitted Atascadero employees to engage in a pattern and practice of egregious conduct against SVPs, while petitioners had knowledge of this ongoing conduct yet willfully ignored, or in some cases actively encouraged, the behavior. The complaint includes, *inter alia*, the following allegations:

- Petitioners implemented a practice of force-medicating respondents in non-emergency situations, and without following proper protective procedures, Pet. App. 87a–88a.
- Petitioners imposed a policy of forcibly restraining respondents and putting them in excessive restraints for non-threatening, non-disruptive conduct. Pet. App. 90a–91a.
- Petitioners imposed a classic Catch-22 designed to ensure that SVPs are never released: SVPs are required to sign a statement admitting they are ill and need confinement and treatment. This statement is used against SVPs at probable cause and commitment hearings as a sign that the SVP needs further ongoing treatment. If the SVP declines to sign the statement,

he cannot progress through the Phases, which is a necessary condition for release. Pet. App. 86a, 88a–89a.

- Petitioners established a policy of putting respondents in four-point restraints and subjecting them to degrading strip searches. Pet. App. 92a.
- Although respondents are civilly, not criminally, confined, petitioners housed them in rooms that lack running water, electrical outlets, tables or chairs, and cannot be locked from the inside. Pet. App. 91a.
- Petitioners established a practice of reducing respondents' access levels and privileges as a form of punishment for refusing to participate in treatment and for filing lawsuits challenging conditions of their confinement. Pet. App. 87a.
- Food served to SVPs at Atascadero is routinely contaminated with spit, urine, rocks, sticks, and hair. Petitioners knew of this ongoing practice, and permitted and encouraged it. Pet. App. 90a.
- Petitioners imposed living conditions on respondents which are, in many respects, worse than prison conditions. These conditions include repeatedly exposing respondents to feces, urine, vomit, spit, and blood in all areas of Atascadero, including the courtyards, bathrooms, hallways, and dining rooms. Pet. App. 89a.
- Respondents were repeatedly subjected to physical abuse, sexual abuse, and verbal harassment at Atascadero by both staff and by patients. Petitioners had personal knowledge of this conduct, and permitted and encouraged this abuse. Pet. App. 90a.

In sum, respondents allege that petitioners established conditions at Atascadero that were "punitive in nature," and designed to keep respondents

committed indefinitely. Pet. App. 85a–87a. They allege that petitioners' policies "are not compatible with treatment purposes, [and] are not reasonably related to a legitimate non-punitive goal." Pet. App. 94a–95a. And they allege that petitioners knew about the egregious abuses at Atascadero, and either willfully ignored, or in some cases actively encouraged, such conduct. Respondents allege that petitioners' conduct violated the First, Fourth, Eighth, and Fourteenth Amendments to the U.S. Constitution, the Ex Post Facto and Double Jeopardy Clauses, and provisions of the California Constitution.

To be clear, respondents are not challenging the validity of the SVP Act, nor are they seeking to be released. Rather, they filed this lawsuit with the goal that they be treated in accordance with constitutional standards for civil commitment, consistent with the SVP Act's requirement that they receive "appropriate treatment," not punishment.

**Proceedings Below**

After substantial discovery, petitioners filed a motion to dismiss, based solely on the pleadings, on the ground of qualified immunity. On August 26, 2003, the district court denied petitioners' motion to dismiss in a one-line order. Pet. App. 65a.

The Ninth Circuit affirmed in part and reversed in part. The court of appeals first noted that its "task is a limited one." Pet. App. 9a. Because petitioners' motion challenged only the complaint, the court held that respondents are "only required to give a 'short and plain statement' of their claims," and that the allegations "are accepted as true and should be construed in the light most favorable to [respondents]." Pet. App. 8a–9a (quoting Fed. R. Civ. P. 8(a)(2)). The

court also recognized that while one goal of qualified immunity "is to protect officers against the burden of discovery and pretrial motions," that concern did not apply here: the court acknowledged that "discovery was almost complete," and that petitioners "could have presented this as a motion for summary judgment." Pet. App. 9a–10a.

The court held that respondents ultimately "will need to show how the deliberate indifference or affirmative actions of each Defendant caused a constitutional violation before they can seek monetary damages." Pet. App. 16a. But the court found that, "[a]t this stage of pleading . . . we do not see how, prior to discovery, they *could* plead the individual roles of each state officer with any more specificity." *Id.* The court found that respondents "sufficiently alleged that the constitutional violations they suffered were 'set in motion' by [petitioners'] policy decisions, or, at the very least, that [petitioners] knew of these abuses and demonstrated a deliberate indifference to the [respondents'] plight." *Id.* The Ninth Circuit concluded that respondents had pled enough detail to "state a claim against all of the named [respondents], each of whom played an instrumental role in policymaking and enforcement at Atascadero State Hospital." Pet. App. 16a–17a.

As to each claim, the court of appeals then reviewed the specific allegations against petitioners to determine whether in fact qualified immunity was appropriate. The court reversed the denial of qualified immunity on several of the claims, including those brought under the Double Jeopardy and Ex Post Facto clauses, procedural due process, and the Eighth Amendment. Pet App. 29a–32a, 46a. The court also reversed the

denial of qualified immunity regarding respondents' purported First Amendment right to refuse treatment, and based on the respondents' allegations of procedural due process violations under the Fourteenth Amendment, holding that the respondents had "not adequately pled the loss of clearly established due process rights." Pet. App. 26a, 32a–33a.

With regard to the respondents' other claims, however, the Ninth Circuit reviewed and evaluated the specific allegations in the complaint and agreed with the district court that the respondents had pled sufficiently concrete allegations to state a claim.

Among other things, the Ninth Circuit found that respondents stated a Fourth Amendment violation based on allegations that "Defendants' policies and practices" subjected respondents to "public strip searches, retaliatory searches of their possessions, and arbitrary seizures of their personal belongings upon arrival at Atascadero." Pet. App. 27a. The court also found that respondents alleged that they are "shackled during transport to Atascadero and during visits with family and friends," they are physically restrained "even when they do not pose any physical risk," and are "force-medicated as a means of intimidation and punishment, and for the convenience of staff." *Id.* Accepting the allegations as true, the court concluded that respondents "may be able to state a 'clearly established' violation of their Fourth Amendment rights." *Id.*

The court of appeals also found the respondents stated constitutional violations arising from allegations regarding the living conditions at Atascadero. The court focused on allegations that petitioners "turned a blind eye" to rampant egregious abuses by others at

Atascadero, and that petitioners forced respondents to "live in squalid conditions that are inhumane and pose a serious health risk." Pet. App. 36a, 37a–38a. The court found that the allegations would violate even "the rights afforded prisoners." Pet. App. 40a.

The Ninth Circuit further found that respondents stated a First Amendment claim by alleging that that petitioners "retaliated against them for filing lawsuits regarding conditions at Atascadero State Hospital," Pet. App. 21a.

Ultimately, the court of appeals ruled that respondents' complaint "alleges practices that would be unconstitutional if directed at any prisoner," Pet. App. 48a, and therefore unquestionably stated a claim in the context of civil commitment.

Judge Trott dissented in part. He agreed with the majority that respondents' allegations presented issues that "are certainly important and require our attention," but he believed that the abuses at Atascadero could be addressed without permitting individual damages claims. Pet. App. 49a.

## REASONS FOR DENYING THE WRIT

Petitioners ask this Court to "grant review to address and resolve the considerable variation among the circuits regarding the specificity of pleading necessary to state a claim in individual-capacity civil rights lawsuits against government actors." Pet. 9. Any "variation among the circuits" about the governing legal standard has already been resolved. This Court, in a series of rulings over the last three decades, has clarified that civil rights claims are subject to Rule 8(a)'s "short and plain statement" pleading standard—and has squarely rejected the

notion (previously adopted by some courts) that § 1983 plaintiffs must plead with particularity facts preemptively negating any qualified immunity defense.

In light of this Court's cases, every circuit now applies the same pleading standard for civil rights cases that it does for other civil cases. Several circuits expressly overruled their own prior heightened standards in light of this Court's recent rulings. All the circuits now recognize that civil rights cases are subject neither to heightened nor relaxed pleadings requirements. The circuits are remarkably uniform, and it would make no sense for this Court to grant review to resolve a disagreement years after the circuits resolved it on their own.

The only "variation" in the cases that petitioner can muster is variation based on facts, not any disagreement about the governing legal standard. A § 1983 complaint against an individual must allege facts that, if true, could give rise to a plausible inference of a violation of a constitutional right that is clearly established. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007); *Scott v. Harris*, 127 S. Ct. 1769, 1773–74 (2007); *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Petitioners pluck language from cases in which courts find that various allegations do or do not create a plausible inference of liability against particular defendants. But such fact-bound differences based on how courts interpret the specific allegations and plausible inferences in particular contexts do not present any issue that requires this Court's resolution. None of petitioners' cases suggest any actual disagreement among the circuits with respect to the pleading standard in § 1983 claims against individual officers, and petitioners' own Question Presented

waives any reliance on a heightened pleading standard by conceding that only Rule 8 applies.

At most, petitioners simply disagree with the Ninth Circuit's reading of this particular complaint. But the Ninth Circuit's standards for evaluating the sufficiency of a civil rights complaint, and for evaluating qualified immunity, are squarely in line with every other circuit. Petitioners chose to pursue qualified immunity based solely on the complaint, and the Ninth Circuit merely held that certain allegations, if true, state a viable claim. That conclusion was unremarkable, since the complaint alleges a pattern of conduct so plainly improper that it would violate even the rights of criminally confined prisoners. And the allegations relate to matters so widespread and central to the nature of the program at Atascadero that it is more than "plausible" to infer that the program's senior administrators were personally involved and/or aware. At summary judgment, petitioners may be able to demonstrate that they are entitled to qualified immunity. But at this stage, petitioners may not transform their disagreement with the complaint's factual allegations into a legal dispute warranting this Court's review.

## I. THE NINTH CIRCUIT CORRECTLY HELD THAT THE COMPLAINT STATES A CLAIM AGAINST PETITIONERS

Petitioners' entire argument is grounded on a misleading portrayal of the Ninth Circuit's opinion below. The heart of their argument is that the Ninth Circuit allowed a complaint to proceed based solely on bare references to unstated "policies," with an unstated connection to petitioners. *See, e.g.*, Pet. i (question presented); Pet. 10. The Question Presented has no

bearing on this case. To the contrary, the Ninth Circuit held that the complaint's specific allegations of policies and acts by petitioners stated a claim (while correctly noting that, in this posture, the allegations must be accepted as true). Those allegations in the complaint are not comparable to the allegations in the cases petitioners rely on, and would state a claim in any circuit.

Both the complaint and the Ninth Circuit's opinion repeatedly focus on explicit allegations regarding the policies implemented at Atascadero, and specific allegations tying petitioners to those policies. For example, the complaint challenges obvious structural elements of the facilities, such as the fact that "bedrooms do not have electrical outlets, running water, tables or chairs, and cannot be locked from the inside." Pet. App. 91a. These are not allegations of isolated rogue conduct by lower level employees. An allegation regarding lack of water or electricity in bedrooms is obviously a policy of the facility which it is manifestly reasonable *at the pleading stage* to attribute to the administrators of the facility.

Similarly, the Ninth Circuit found that respondents adequately alleged that "they are forced to live in squalid conditions that are inhumane and pose a serious health risk." Pet. App. 37a–38a. Again, this is not an allegation of a one-time incident, but rather an allegation regarding the endemic, pervasive conditions at Atascadero, about which it is certainly plausible to infer at the pleading stage that petitioners knew or should have known. (Petitioners remain free to file a summary judgment motion if these eminently plausible inferences from the pleadings turn out not to be consistent with the facts as revealed in discovery).

Other allegations in the complaint describe repeated patterns of egregious conduct, and specifically allege not only a pattern of behavior, but petitioners' knowledge of the behavior, and their decision either to ignore, or in some cases to encourage, such behavior. For example, the Ninth Circuit noted that respondents alleged that "they are intentionally exposed to feces, urine, vomit, spit, and blood in Atascadero's courtyards, bathrooms, hallways, dining rooms, and gymnasium." Pet. App. 36a. The complaint alleges not only that such conditions are rampant, but also that petitioners "have personal knowledge of this conduct," and yet "permit and encourage this and other harassment of SVPs." Pet. App. 90a.

The complaint also alleges a policy or practice of "force-medicating the Plaintiffs in non-emergency situations" with psychotropic drugs, and "public strip searches, retaliatory searches of their possessions, and arbitrary seizures of their personal belongings upon arrival at Atascadero." Pet. App. 7a, 27a. Again, the Ninth Circuit correctly observed that the complaint alleges that these are not isolated incidents, but rather that they are part of established "policies and procedures" at Atascadero, and that petitioners "knew of these abuses and demonstrated a deliberate indifference to [respondents'] plight." Pet. App. 16a. Respondents are entitled to all plausible inferences from the alleged facts, and are not required to allege with particularity at the pleadings stage the particular conversations or acts by which each defendant participated in the formulation of these unconstitutional policies. That would be heightened pleading under Rule 9(b), not notice pleading under Rule 8.

These are just examples. The Ninth Circuit recognized that the complaint alleges, in great detail, a variety of practices and policies at Atascadero, and alleges petitioners' direct role in creating, or willfully ignoring, these practices. The complaint unquestionably alleges facts that, if true, plausibly show that respondents would be "entitled to relief" under Rule 8.

Ultimately, petitioners cannot genuinely argue that the complaint lacks specificity regarding the substance of the policies, and they cannot genuinely argue that the complaint fails to allege that petitioners themselves were responsible for these policies. The substance of petitioners' objection is that they believe the facts will show otherwise. But, as the Ninth Circuit correctly found, petitioners chose to force the courts to evaluate their qualified immunity defense solely on the pleadings, and subject to the rule that the facts alleged in the complaint must be taken as true. Pet. App. 1. In this posture, the Ninth Circuit's holding that the complaint states a claim was unquestionably correct, and consistent with established law. Indeed, petitioners' strategic decision to disregard the evidence assembled during nearly-complete discovery and focus on the pleadings is a strong indication that the facts support respondents' claims.

## II. THE CIRCUITS UNIFORMLY APPLY THE SAME STANDARD TO EVALUATE CIVIL RIGHTS COMPLAINTS

In the past, some circuits applied a heightened standard of pleading for civil rights cases involving individual defendants. The Eighth Circuit, for example, held that complaints against government officials "are subject to a heightened standard of

pleading with sufficient specificity to put defendants on notice of the nature of the claim." *Edgington v. Missouri Dep't of Corr.*, 52 F.3d 777, 779 (8th Cir. 1995). The Ninth Circuit required a "'substantial preliminary showing'" of the defendant's motive where subjective intent was at issue. *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991) (citation omitted). The First Circuit required plaintiffs to plead "specific facts," and applied a "heightened requirement of specificity" for civil rights cases. *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 16–17 (1st Cir. 1989); *Boston & Me. Corp. v. Town of Hampton*, 987 F.2d 855, 866 (1st Cir. 1993).

However, in light of recent opinions by this Court, each of these circuits has expressly overruled its prior precedent. Every circuit now recognizes that Rule 8 applies, and that there is neither a heightened nor a relaxed pleading requirement for civil rights claims against individual officers.

### A. This Court's Opinions Establish the Applicable Pleading Standard

Over the last three decades, this Court has clarified the standards governing pleading a civil rights claim against individual defendants.

In *Gomez v. Toledo*, 446 U.S. 635 (1980), this Court squarely rejected any suggestion that a civil rights plaintiff bears the burden of pleading that the officer acted in bad faith in order to overcome qualified immunity. This Court held that "[b]y the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute." *Id.* at 639. The Court confirmed that a plaintiff need only allege (1) "that some person has deprived him of a federal right," and (2) "that the person who has

deprived him of that right acted under color of state or territorial law." *Id.* at 639–40. The Court explained that, whether the claim is brought under § 1983 or under the Constitution, the Court "has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question. . . . Since qualified immunity is a defense, the burden of pleading it rests with the defendant." *Id.* at 640.

Just two years later, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court considered the scope of immunity for aides to the President. The Court reiterated that "[q]ualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." *Id.* at 815. The relevant question is whether the officer's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, this Court rejected any "'heightened pleading standard'—more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure—[for] civil rights cases alleging municipal liability under" § 1983. 507 U.S. 163, 164 (1993). This Court held that "it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules," and that "Rule 8(a)(2) requires that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* at 168. This Court noted that "the Federal Rules do address in Rule 9(b) the question of the need

for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983," and applied the canon "*[e]xpressio unius est exclusio alterius*." *Id.* at 168.

In *Crawford-El v. Britton*, 523 U.S. 574 (1998), this Court addressed whether lower courts may craft special procedural rules in qualified immunity cases—and in particular, whether they may require plaintiffs to present clear and convincing evidence of improper motive to defeat a motion for summary judgment. Once again, this Court rejected any heightened pleading or proof standards and focused on the applicable rules and statutes. This Court held that "[n]either the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provides any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself." *Id.* at 594. This Court also noted that district courts retain a variety of tools to protect officers from unnecessary discovery, such as a reply under Rule 7(a), or a motion for a more definite statement under Rule 12(e). *Id.* at 597–98. This Court made it crystal clear, however, that courts are not permitted to manufacture new rules for qualified immunity cases.

This Court confirmed that principle in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), holding unanimously that courts may not impose heightened pleading requirements absent a rule or statute so providing. This Court held that the Second Circuit's heightened pleading requirement for employment cases "conflicts with Federal Rule of Civil Procedure 8(a)(2)." *Id.* at 512. This Court confirmed that, aside

from the exceptions identified in Rule 9(b), "rule 8(a)'s simplified pleading standard applies to all civil actions." *Id.* at 513. As in *Leatherman*, this Court noted that "[j]ust as Rule 9(b) makes no mention of municipal liability under [42 U.S.C. § 1983], neither does it refer to employment discrimination." *Id.*

More recently, *Hill v. McDonough*, 547 U.S. 573 (2006), reached the same conclusion in a prisoner § 1983 claim: "Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts." *Id.* at 582.

And just last Term, this Court in *Twombly* and *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), reaffirmed that Rule 8 means what it says, and applies to all civil cases unless a rule or statute otherwise provides. This Court held that "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 127 S. Ct. at 1974. Similarly, in *Erickson* this Court confirmed that a § 1983 plaintiff only needs to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" 127 S. Ct. at 2200 (quoting *Twombly*, 127 S. Ct. at 1964). This Court squarely held that "specific facts are not necessary." *Id.*

This Court's opinions could not be clearer. This Court has repeatedly rejected attempts by the lower courts to impose heightened standards of proof, or heightened pleading requirements, in the absence of rules or statutes so providing. This Court has repeatedly confirmed that Rule 8—and only Rule 8—applies to civil rights claims, including claims against individual officers raising qualified immunity issues.

### B. All the Circuits Now Apply this Court's Decisions

At different times, different circuits have employed various forms of heightened pleading requirements for civil rights claims brought against individual officers. All of those cases have now been expressly overruled or abandoned in light of this Court's intervening decisions, and the case law is now remarkable uniform and consistent across the circuits.

First Circuit. The First Circuit previously applied a heightened pleading standard, but has now overruled it. In *Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61 (1st Cir. 2004), the First Circuit revisited its pleading requirements for civil rights claims against individual officers. The court recognized that this Court's jurisprudence "evinces a developing trend. This trend has approached crystalline form with *Swierkiewicz*. . . . We join several of our sister circuits in holding that there are no heightened pleading standards for civil rights cases," and that "[a]ll civil rights actions are subject to Rule 8(a)'s notice pleading regime. To the extent that preexisting circuit precedent contradicts this holding, we regard that precedent as abrogated by recent Supreme Court case law." *Id.* at 65–67; *see also Calvi v. Knox County*, 470 F.3d 422, 430 (1st Cir. 2006) ("[T]his court has held that there are no heightened pleading standards for civil rights cases and that, therefore, notice pleading rules apply to such actions.").

Second Circuit. The Second Circuit has reached the same conclusion. That court recently addressed the pleading standard for § 1983 claims against individual officers. After surveying *Twombly*'s discussion of Rule 8, the Second Circuit held that "[a]bsent any indication

from the Supreme Court that qualified immunity might warrant an exception to this general approach and the explicit disclaimer of a heightened pleading standard in *Bell Atlantic*, reinforced by the reversal of the Tenth Circuit's use of a heightened pleading standard in *Erickson*, we conclude that a heightened pleading rule may not be imposed." *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007).

Third Circuit. The Third Circuit picked up on the trend as early as 1998, and held that "no more is required of a plaintiff in § 1983 cases" than "the standards of notice pleading." *Abbott v. Latshaw*, 164 F.3d 141, 148 (3d Cir. 1998) (citing *Leatherman*, 507 U.S. at 168–69), *cert. denied*, 527 U.S. 1035 (1999); *see also Thomas v. Independence Twp.*, 463 F.3d 285, 289 (3d Cir. 2006) ("[A] plaintiff has no pleading burden to anticipate or overcome a qualified immunity defense, and a mere absence of detailed factual allegations supporting a plaintiff's claim for relief under § 1983 does not warrant dismissal of the complaint or establish defendants' immunity.").

Fourth Circuit. The Fourth Circuit similarly has held that "there is no heightened pleading standard in qualified immunity cases." *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001), *cert. denied*, 537 U.S. 1045 (2002). As this Court suggested in *Leatherman*, the Fourth Circuit has encouraged district courts to use the tools of the federal rules to protect against unnecessarily disruptive discovery. *Id.*

Fifth Circuit. The Fifth Circuit previously had a pleading standard that could arguably be described as heightened. But in 1995, the Fifth Circuit recognized that its decisions had intended to require only that plaintiffs "not plead conclusions"—which, of course, is

perfectly consistent with Rule 8. *Schultea v. Wood*, 47 F.3d 1427, 1430 (5th Cir. 1995). More recently, the Fifth Circuit explained that "[i]n our decision in *Schultea* . . . this court modified our prior practice of requiring heightened, detail-oriented pleading in § 1983 cases against public officials. After *Schultea*, a plaintiff no longer needs to 'anticipate the [qualified immunity] defense in his complaint at the risk of dismissal under Rule 12.'" *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004) (quoting *Schultea*, 47 F.3d at 1430) (alteration in original).

Sixth Circuit. The Sixth Circuit confirms that "the Federal Rules of Civil Procedure provide for a liberal system of notice pleading. . . . Claims made pursuant to 42 U.S.C. § 1983 are not subject to heightened pleading standards." *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004).

Seventh Circuit. The Seventh Circuit holds that "as the Supreme Court and this court have emphasized, there are no special pleading rules for prisoner civil rights cases." *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002) (citing *Swierkiewicz*); *cf. Estate of Sims v. County of Bureau*, 506 F.3d 509, 514 (7th Cir. 2007) (applying Rule 8 and *Twombly* to civil rights claim under § 1983); *see also Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir.) ("Civil rights complaints are not held to a higher standard than complaints in other civil litigation."), *cert. denied*, 525 U.S. 973 (1998).

Eighth Circuit. The Eighth Circuit previously applied a heightened standard, but has now overruled that standard: "We now recognize [our prior case's] heightened pleading requirement in § 1983 suits against individual defendants has been abrogated," and that "[t]he only permissible heightened pleading

requirements in civil suits are those contained in the Federal Rules of Civil Procedure or those in federal statutes enacted by Congress." *Doe v. Cassel*, 403 F.3d 986, 989 (8th Cir. 2005).

Ninth Circuit. The Ninth Circuit similarly now recognizes that its prior heightened requirement was inconsistent with this Court's cases: "In light of *Crawford-El*, nearly all of the circuits have now disapproved any heightened pleading standard in cases other than those governed by Rule 9(b)." *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002). "In light of *Crawford-El* and *Swierkiewicz*, we must conclude that [our prior cases] are no longer good law to the extent that they require heightened pleading of improper motive in constitutional tort cases." *Id.*; *see also Empress LLC v. City & County of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005) ("[T]he logical conclusion of *Leatherman*, *Crawford-El*, and *Swierkiewicz* dictates that a heightened pleading standard should only be applied when the Federal Rules of Civil Procedure so require.").

Tenth Circuit. The Tenth Circuit has also overruled its prior heightened pleading standard in light of this Court's recent cases. "We conclude that this court's heightened pleading requirement cannot survive *Crawford-El*. . . . [T]his court's heightened pleading requirement was based on *Harlow*. . . . Nevertheless, as the Supreme Court made clear in *Crawford-El*, neither the holding nor the reasoning of *Harlow*, a qualified immunity case, warranted a change in the requirements of a plaintiff's affirmative case." *Currier v. Doran*, 242 F.3d 905, 915–16 (10th Cir. ), *cert. denied*, 534 U.S. 1019 ( 2001).

Eleventh Circuit. Petitioners correctly note that the Eleventh Circuit continues to describe its pleading standard as "heightened." *Epps v. Watson*, 492 F.3d 1240, 1242–43 (11th Cir. 2007). However, as with the Fifth Circuit's prior standard, it is far from clear that there is anything in fact "heightened" about its standard. The Eleventh Circuit describes its "heightened" standard as requiring that plaintiffs cannot rely on "'vague or conclusory allegations,'" and must include at least "'[s]ome factual detail.'" *Id.* (citations omitted). That standard is consistent with Rule 8 and is not meaningfully different from other circuits. The 11th Circuit also has not yet re-analyzed its case law under this Court's recent decisions in *Twombly* and *Erickson*.

D.C. Circuit. The D.C. Circuit addressed the pleading requirement in a civil rights claim brought under § 1983, and confirmed that "at this stage of the litigation, [plaintiff] needed only to supply 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. R. Civ. P. 8(a), which he has done." *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004) (citing *Swierkiewicz* and *Leatherman*).

In sum, the current state of the law in the circuits is remarkably uniform. With the possible exception of the 11th Circuit, all of the formerly divergent circuits have now reevaluated their pleading standards for civil rights cases against individual defendants in light of this Court's recent opinions. All have reached the same conclusion: Rule 8 applies, there are no heightened pleading requirements, and the complaint must merely allege facts permitting a plausible inference of individual liability, or a reasonable

expectation that discovery will lead to evidence of the personal involvement of the individual defendant.

### C. None of Petitioners' Cited Cases Demonstrate that Other Circuits Would Disagree

Despite the extraordinary consistency in the articulated pleading standards across the circuits, petitioners claim to have identified some cases that suggest a conflict. Petitioners misunderstand the cases, which reflect fact-bound applications of settled law to particular factual settings.

Petitioners suggest that the Second and Seventh Circuits may accept *reduced* pleading standards, and endorse conclusory allegations. That is incorrect.

The Second Circuit in *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), revisited the pleading standards for § 1983 claims in light of *Twombly*. After surveying *Leatherman*, *Crawford-El*, *Swierkiewicz*, and *Twombly*, the Second Circuit confirmed that "absent any indication from the Supreme Court that qualified immunity might warrant an exception to" Rule 8's ordinary notice pleading requirements, "and the explicit disclaimer of a heightened pleading standard in *Bell Atlantic*, reinforced by the reversal of the Tenth Circuit's use of a heightened pleading standard in *Erickson*, we conclude that a heightened pleading rule may not be imposed." *Id.* at 158. The court rejected "a universal standard of heightened fact pleading," and instead held that a plaintiff simply must "amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Id.* at 157–58. The Second Circuit's standard plainly is neither heightened nor reduced, requires a level of detail that will vary depending on

the particular theory of the case, and is consistent with the standards articulated by this Court and adopted by other circuits.

Indeed, what petitioners point to as evidence of a relaxed standard was in fact that court's effort to *protect* individual defendants in civil rights cases. Just as the Ninth Circuit did below, and just as this Court endorsed in *Leatherman* and *Crawford-El*, the Second Circuit embraced notice pleading but simultaneously encouraged district courts to avail themselves of tools such as Rule 12(e), and "carefully targeted discovery," in order to provide "countervailing discovery safeguards" to "Rule 8(a)'s liberal pleading requirement." *Id.* at 158–59. That approach is consistent with established law. It also does not in any way help petitioners, who, having completed virtually all discovery, chose to move solely on the complaint.

Similarly, the Seventh Circuit has consistently held that "[c]ivil rights complaints are not held to a higher standard than complaints in other civil litigation." *Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir. 1998); *see also Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002) ("[A]s the Supreme Court and this court have emphasized, there are no special pleading rules for prisoner civil rights cases."). Petitioners claim that some language in *Higgs*—which predates *Twombly*—suggests that complaints should not be dismissed on the ground that they are conclusory. But the Seventh Circuit now applies *Twombly*, just as every other circuit does. *See Estate of Sims v. County of Bureau*, 506 F.3d 509, 514 (7th Cir. 2007) (applying Rule 8 and *Twombly* to civil rights claim under § 1983).

With respect to the Fifth Circuit, petitioners themselves concede that what the Fifth Circuit meant

by a "heightened pleading standard" is that it does not permit "'conclusory' allegations." Pet. 13. That, of course, is not "heightened" in any meaningful way, and it is consistent with current law.

Petitioners rely heavily on *Oliver v. Scott*, 276 F.3d 736 (5th Cir. 2002). *See* Pet. 14–16. That case predates *Swierkiewicz*, predates *Twombly* and *Erickson*, and predates the Fifth Circuit's own repudiation of heightened pleading in *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004) (confirming that the Fifth Circuit had "modified our prior practice of requiring heightened, detail-oriented pleading in § 1983 cases against public officials").

In any event, there is nothing in *Oliver* that helps petitioners. In *Oliver*, the plaintiff sued state correctional officials for cross-sex strip searches. The court held that the only policy the plaintiff pointed to was a policy delegating authority to administer strip searches to wardens. After noting that the language of the policy is facially constitutional, the court correctly held that any unconstitutional *application* at most could be attributed to the warden, that higher-up officials could not be liable on a *respondeat superior* theory, and that the constitutional policy statement effectively severed the state officials from responsibility for any improper application of the policy.

*Oliver* has nothing to do with this case. The Ninth Circuit held that respondents stated a claim against petitioners for specific policies created and implemented by petitioners, and for intentional conduct by petitioners, *that were themselves unconstitutional.* The fact that the Fifth Circuit declined to permit a case to continue based on different facts, in a different

context, based on a different policy, only means that different facts may lead to different results. Nothing in *Oliver* suggests that the Fifth Circuit would reach a different outcome on the facts of this case.

As explained above, petitioners correctly note that the Eleventh Circuit continues to describe its pleading standard as "heightened." *Epps*, 492 F.3d at 1242. But as *Epps* itself demonstrates, the standard is not "heightened" in any practical sense. The Eleventh Circuit in *Epps* affirmed denial of qualified immunity under the First Amendment based only on an allegation that the plaintiff allowed opponents of the defendant to post campaign signs on her property and was fired the next day. The court held that it was "reasonable to infer" retaliation based on those spare allegations. *Id.* at 1244. The court similarly denied immunity under the Due Process clause even though the defendant argued that the plaintiff did not plead that the county's personnel policy applied to her. The Eleventh Circuit, "[d]rawing all inferences in favor of [plaintiff]," held that the allegations referencing the policy were sufficient. *Id.* at 1247. That result does not indicate any special burdens on plaintiffs in the Eleventh Circuit. (Regardless, this case would be an inappropriate vehicle to address any confusion in the Eleventh Circuit, and also premature—since the Eleventh Circuit has not yet reanalyzed these issues after this Court's recent cases.)

Petitioners also grasp at fact patterns in different cases, in hopes of showing that other courts might have reached different conclusions. But these courts all apply the same legal standard, and all petitioners can demonstrate is that different factual contexts may lead to different results. These cases do not establish that

the Ninth Circuit's conclusion in this case was incorrect, or that there is any dispute worthy of this Court's consideration.

For example, petitioners point to the First Circuit's analysis in *Redondo-Borges v. U.S. HUD*, 421 F.3d 1 (1st Cir. 2005). *See* Pet. 26. In *Redondo-Borges*, plaintiffs alleged that they were "debarred" from contracting in violation of their right to procedural due process. 421 F.3d at 8. The court found that the complaint "does little more than describe what the plaintiffs call a suspension," but "does not anchor this pejorative term in any supporting facts." *Id.* 8–9. That, of course, is a far cry from the specific allegations in this case, in which the lengthy complaint is full of supporting facts.

Similarly, petitioners rely on *Evancho v. Fisher*, 423 F.3d 347 (3d Cir. 2005). *See* Pet. 21–24. *Evancho* dealt with a single isolated decision of the sort routinely made by lower level supervisors—the one-time transfer of the plaintiff to a lesser job position at Pennsylvania's Bureau of Narcotics Investigation and Drug Control. The Third Circuit held that the plaintiff could not pursue a constitutional claim *against the Attorney General of Pennsylvania* in his individual capacity without alleging facts showing the Attorney General's involvement in her transfer. 423 F.3d at 353. The Third Circuit correctly held, in other words, that the bare facts alleged about one-time conduct by a low level employee did not supply "plausible grounds to infer" that the Attorney General was personally involved in the transfer. *Cf. Twombly*, 127 S. Ct. at 1965.

But the allegations of structural and pervasive misconduct in this case certainly do provide "plausible

grounds to infer" that petitioners knew about, and participated in, the practices alleged in the complaint. This case involves allegations of far more systemic and widespread constitutional violations, and claims against hospital and program administrators far closer in the chain of command (and observation) to those problems than the Attorney General was to the decision at issue in *Evancho*. Petitioners in this case are charged with responsibility for the central policies of the hospital they are charged with running, and with knowledge of constitutional violations that were so widespread and systemic that it is eminently plausible to infer their knowledge and approval.[3]

In a similar vein, the Second Circuit in *Yeng Jing Gan v. City of New York*, 996 F.2d 522 (2d Cir. 1993), rejected a substantive due process claim alleging an assistant district attorney's failure adequately to protect a complaining witness, under *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). In dicta, the court noted that plaintiff also had not alleged facts linking the Manhattan district attorney to the allegations. *Id.* at 536. As with *Evancho*, failing to allege facts tying a supervisor to a single event does not shed light on the conduct in this case.

Petitioners' reliance on *Moya v. Schollenbarger*, 465 F.3d 444 (10th Cir. 2006), is emblematic of their effort

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[3] The Ninth Circuit issued its opinion below shortly after *Twombly*, and although it did not use the language of *Twombly*, its analysis of the complaint is entirely consistent with that decision. The Ninth Circuit's opinion leaves no doubt that it found ample factual allegations supplying "plausible grounds to infer" clearly established constitutional violations attributable to petitioners.

to transform radically different fact patterns into a purported dispute over the law. *Moya* involved a plumber at the State Fair who had complained to his supervisors about conditions at the Fair, and alleged that his supervisors retaliated against him for speaking out. *Id.* at 446. The Tenth Circuit held, among other things, that the plaintiff had not alleged any actual adverse employment action. The court noted that Mr. Moya had simply alleged that he was "exposed" to a "hostile work environment," but that such a declaration was too conclusory to state a First Amendment retaliation claim. *Id.* at 457. The court found that "Mr. Moya's amended complaint is completely devoid of any supporting factual allegations as to what made his work environment or work conditions hostile." *Id.*

Petitioners' argument that the allegations in *Moya* are "similarly conclusory" to the complaint in this case, Pet. 25, is utterly divorced from the Ninth Circuit's opinion, and from the complaint. In *Moya*, the plaintiff alleged that he faced "hostile work conditions," and did not specify what he meant by such conditions. In this case, respondents allege egregious conditions of civil confinement, and the Ninth Circuit found that these allegations consisted of, among other things:

> (1) force-medicating the Plaintiffs in non-emergency situations; (2) reducing the Plaintiffs' access levels and other privileges as a form of punishment for refusing to participate in treatment sessions or as retaliation for filing lawsuits; (3) putting the Plaintiffs in restraints for nonthreatening and/or nondisruptive conduct, including the refusal to participate in treatment or therapy; (4) subjecting the Plaintiffs to public strip-searches (sometimes

> while in four-point restraints); (5) failing to protect the Plaintiffs from abuse by other patients or by Atascadero employees; (6) failing to provide the Plaintiffs with constitutionally satisfactory conditions of confinement; (7) forcing the Plaintiffs to participate in treatment; and (8) denying the Plaintiffs adequate treatment, thereby converting the Plaintiffs' civil confinement to a de facto extension of their prison sentence.

Pet. App. 7a.[4]

In sum, the only thing petitioners' cases demonstrate is that different fact patterns may lead to different results. The fact that other courts have rejected complaints with far more conclusory allegations does not cast any doubt on the propriety of the Ninth Circuit's conclusion in this case. Indeed, petitioners' arguments simply confirm that their only genuine grievance is with the lower courts' fact-bound reading of the allegations in this particular case.

* * *

Petitioners invoke the specter that the prospect of defending civil rights lawsuits will "distract officials from their governmental duties, inhibit their decisionmaking, and deter qualified people from entering public service." Pet. 34. Given that petitioners chose to wait until the end of discovery, and

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[4] Similarly, petitioners cite cases that reject complaints relying solely on a "bare assertion of the existence" of a policy. Pet. 27. Petitioners' recitation alone should suffice to demonstrate why those cases do not apply here. The Ninth Circuit found that there was much more than a "bare assertion" of policies and practices, and that conclusion is amply supported by the complaint.

then chose to move solely on the pleadings, their fear of discovery rings hollow. All that the Ninth Circuit held was that the facts alleged in the complaint, if true, would show that these petitioners engaged in a pattern of egregious violations of constitutional rights. Permitting such allegations to reach discovery will not threaten any governmental decisionmaking, but instead will simply allow potentially serious misconduct by state officials to come to light.

Petitioners cannot legitimately contend that any court would reject these allegations on the pleadings, and there is no reason for this Court to grant review at this stage.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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